(25,805)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 975.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, PETITIONER,

vs.

ELIZABETH CREAGER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1917.

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No. 2948.

United States Circuit Court of Appeals Sixth Circuit

W. T. HENDRICKSON, JUDGE OF TAYLOR COUNTY COURT, AND J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS AND T. E. WISE, JUSTICES OF THE PEACE OF TAYLOR COUNTY, KENTUCKY,

Plaintiffs in Error,

vs.

ELIZABETH CREAGER,

Defendant in Error.

Error to the District Court of the United States for the Western District of Kentucky.

RECORD

Original transcript filed July 24, 1916.

TRANSCRIPT OF RECORD.

In the District Court of the United States for the Western District of Kentucky, at Louisville.

W. T. Hendrickson et al., Plaintiffs-in-Error, vs. Elizabeth Creager, Defendant-in-Error.

PETITION FOR MANDAMUS—Filed May 2, 1916.

The plaintiff, Elizabeth Creager, states that heretofore, to wit, on the .. .. day of ....., 1915, she filed her petition in this court, whereby she sought to recover of the county of Taylor, in the state of Kentucky, certain sums of money therein set forth, with interest thereon; and that a summons was duly issued on said petition and was duly served by the marshal of this court upon the said county of Taylor on the ..... day of ....., 1915; that thereafter such proceedings were had therein that judgment was duly rendered therein on October ....., 1915, in this plaintiff's favor against said county of Taylor for the sum of thirteen thousand, four hundred and fifty-seven and 50.100 ($13,457.50) dollars, with interest thereon from said date of said judgment and for her cost therein expended; that upon said judgment an execution of fieri facias was issued on December ....., 1914, directed to the marshal of this court, commanding him to make the amount of said judgment out of said defendant; and that the said execution was placed in the hands of the said marshal, while in full force and effect, for the execution thereof, and that the said marshal returned said execution on the ..... day of ....., 1915, in substance, No property found. She says that said judgment has never been set aside, reversed or modified, and is now in full force and effect, and no part thereof has been paid, and that her costs in said action amounted to $..... ..... dollars.

Plaintiff says that the defendant, W. T. Hendrickson, is the duly elected, qualified and acting judge of the Taylor county court, and the defendants, W. H. Bennett, J. B. Jones, L. Morgan, A. W. Miller, Ruel Eads and T. E. Wise, are the duly elected, qualified and acting justices of the peace of said county of Taylor, and that all of said defendants together compose the Fiscal Court of said county of Taylor, and it is the duty of said court to levy taxes for all county purposes which tax consists of a poll tax for each male inhabitant in said county over twenty-one years of age, not exceeding one dollar and

fifty cents, and an ad valorem tax on all property subject to taxation in said county. She says that it is the duty of the said W. T. Hendrickson, constituting the County Court of said county, to appoint a collector of all taxes levied by the said Fiscal Court in case the sheriff of said county should fail to execute bond or qualify as provided by law, or in case of a vacancy in the office of the sheriff of said county for any cause. She says that there is now no sheriff of said county, and there is a vacancy in said office of sheriff of said county.

Plaintiff states that she has demanded payment of the county of Taylor of her said debt upon which said judgment was rendered, and of said judgment, but said county refused, and still refuses, to pay same, and the Fiscal Court of said county refused, and still refuses, to levy any tax to pay said judgment or the debts upon which it was rendered, and the defendants have failed and refused, and will continue to refuse to levy or have collected any tax or make any other provision for the payment of said judgment until required so to do by order of this court.

Wherefore, plaintiff prays the court to issue its writ of mandamus commanding and requiring the defendant to levy a tax sufficient to pay said judgment for the purpose of paying same, and that they be required to include in the order making the levy for other purposes, for which they are authorized to make a levy, the levy for the aforesaid purpose, and that the defendant, W. T. Hendrickson, in his capacity as County Court, be required to appoint a collector to collect said tax, and that said court be required to appoint the same collector for said tax that is appointed to collect the taxes for other purposes levied by said Fiscal Court, and that said court be required to make said appointment of a collector to collect all the taxes levied by it by one order, that when the county judge appoints a collector or whose duty it shall be to collect any or all items of a levy made by the Fiscal Court of Taylor county for any purpose, he shall embrace in the order of appointment a direction to the officer to collect both the levy made to pay this judgment and the levy made or to be made for any items which may be levied by the Fiscal Court of Taylor county, and shall continue to so embrace same until a collector is appointed who will qualify as such collector, and exact of him but one bond to cover the collection of the levy made to pay this judgment and the item or items of levy made by the Fiscal Court of Taylor county for any purpose, and that the defendants, as said Fiscal Court, be required,

when any money for any taxes levied by said court, except poll taxes, shall come into the hands of the treasurer of said county, or any other official or person, to order and have paid to this plaintiff on her aforesaid judgment such a portion of the amount so received as the rate of taxation that may be levied to pay the plaintiff's judgment aforesaid bears to the rate of taxation that may be levied by said court for all purposes. She prays for judgment for her costs herein expended, and for all relief.

L. A. Faurest,
Atty. for Plaintiff.

The affiant, L. A. Faurest, states that he is attorney herein for the plaintiff, Elizabeth Creager, and that said plaintiff is absent from the state of Kentucky. He says that the statements of the foregoing petition are true, as he verily believes.

L. A. Faurest.

Subscribed and sworn to before me by L. A. Faurest, this May 2, 1916.

John P. Haswell, Jr.,
U. S. Commissioner for the Western District of Kentucky.

ANSWER.—Filed May 29, 1916.

Defendants, for answer to the petition herein, say:

That prior to the institution of this action, to wit, on January 24, 1916, the County Court of Taylor county appointed W. O. Hendrickson collector of state taxes for Taylor county for the year 1916, it having been made to appear to the court that the office of sheriff was vacant, and that one J. A. Sanders, who had been appointed by the court as sheriff of Taylor county, had refused to qualify as such.

Answer.

Subsequent to the appointment of said Hendrickson as state tax collector, he, on January 27, 1916, duly qualified as such by executing bond as required by law. A duly attested copy of the order of the Taylor County Court appointing said Hendrickson, and showing his qualification aforesaid, is filed herewith as part hereof, marked "Exhibit A."

Prior to the institution of this action, to wit, on April 6, 1916, the Fiscal Court of Taylor county made a levy of taxes for the year 1916 upon all property subject to taxation in Taylor county in the following terms, to wit:

"For the purpose of paying the claims allowed by the Fiscal Court of Taylor county at its October term 1915, and at its April term 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business. It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916. This amount, when collected, to be apportioned as follows:

Ten cents on each one hundred dollars as assessed and equalized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the salaries of the county officials and the incidental expenses for the year 1916. And that five cents on each one hundred dollars worth of taxable property as assessed and equalized for taxation for the year 1916, be used for paying off the pauper claims for the aforesaid year. And that thirty-five cents on each one hundred dollars, as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916. Four thousand, six hundred dollars ($4,600.00) be used in connection with like sum from the state for the purpose of continuing the ——— on the state roads in the aforesaid county, which are now under construction.

It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollers worth of taxable property of Taylor county, as assessed and equalized for taxation for the year 1916, and a poll

Answer.

tax of one dollar on each poll in Taylor county as returned by the assessor for the year 1916, for the purpose of maintaining and **equiping** the common schools for the year 1916."

A duly attested copy of the order of said Fiscal Court, making said levy, is filed herewith as part hereof, marked "Exhibit B."

Defendants further say that under the statutes of Kentucky, as construed by the Court of Appeals of Kentucky, the County Court of Taylor county has a discretion as to whether it will appoint one person to collect all moneys due the state and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payments of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond. And they respectfully submit that this Honorable Court cannot, by its judgment, control the aforesaid discretion of the County Court of Taylor county, given it by the statutes of Kentucky as construed by the Court of Appeals of Kentucky.

Jeff. Henry,
Abel Hardin,
Bruce & Bullitt,
Attorneys for Defendants.

Defendant, W. T. Hendrickson, being duly sworn, says he is one of the defendants in the above styled case, and that the statements of the foregoing answer are true.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 26th day of May, 1916.

My commission expires Feby. 16, 1920.

[Seal] M. W. Tucker,
Notary Public, Taylor County, Kentucky.

Exhibit A.

At a special term of the Taylor County Court, commenced and held at the court house in Campbellsville, Ky., on the 24th day of January, 1916.

Present: The Hon. W. T. Hendrickson, Judge.

It appearing to the court that office of sheriff is

Answer.

vacant in Taylor county, and that on the 10th day of January, 1916, the court appointed J. A. Sanders as sheriff of Taylor county, Kentucky, and that on the 15th day of January, 1916, that said Sanders failed and refused to qualify, and that on account of the failure of said Sanders to qualify as sheriff, and there being no tax collector in Taylor county, Kentucky, for the collection of the state tax for the year 1916. It is now ordered by the court that W. O. Hendrickson be, and he is hereby, appointed state tax collector for Taylor county, Kentucky, for the year 1916, and before he shall collect said tax, he will execute bond according to law, conditioned that he will only collect state taxes.

Ordered that court adjourn until court in course.

W. T. Hendrickson, J. T. C. C.

At a special term of the Taylor County Court, commenced and held at the court house in Campbellsville, Ky., on the 27th day of January, 1916.

Present: The Hon. W. T. Hendrickson, judge.

This day came W. O. Hendrickson, special tax collector of Taylor county, and open court, produced his quietus for the state revenue for the year 1915.

Thereupon said W. O. Hendrickson, special collector aforesaid, with the Maryland Casualty Company of Baltimore, Maryland, his sureties, executed to the commonwealth of Kentucky a bond for the collection and payment of the state revenue for the year 1916, which bond is in words and figures as follows:

Sheriff's Bond for State Revenue.

We, W. O. Hendrickson, special collector of Taylor county, and Maryland Casualty Company, of Baltimore, Maryland, his sureties, bind and obligate ourselves jointly and severally to the commonwealth of Kentucky in the penal sum of fifteen thousand dollars ($15,000) that W. O. Hendrickson, special tax collector, shall faithfully perform his duties.

Witness our signatures this the 27th day of January, 1916.

W. O. Hendrickson.

Maryland Casualty Company,

By C. W. Jefferson,

Attorney in Fact.

State of Kentucky, County of Taylor, set.:

I, C. W. Ramsey, clerk of the county and state aforesaid, do hereby certify that foregoing is a true and correct copies of the order appointing W. O. Henrickson, special tax collector of Taylor county for the year 1916,

together with his qualification and bond, said orders and bond being duly recorded in order book No. 9, pages 618 and 619 of the records of the Taylor county clerk's office.

Witness my hand this the 20th day of May, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

Exhibit "B."

April term, 6th day of April, 1916.

Court met pursuant to adjournment at the court house in Campbellsville, Ky., on the 6th day of April, 1916.

Present the Hon. W. T. Hendrickson, presiding judge of the Taylor County Fiscal Court, together with the following justices, W. H. Bennett, J. D. Jones, Jr., Lewis Morgan, A. W. Miller, Ruel Eades and T. A. Wise. For the purpose of paying the claims allowed by the Fiscal Court of Taylor county at its October term 1915, and at its April term 1916, and the claims allowed by the county judge for the fiscal year 1916, being for the current and necessary expenses for said state county business.

It is ordered by the court that there be, and there is hereby, levied an ad valorem tax of fifty cents of each one hundred dollars worth of taxable property, as assessed and equealized for taxation for the year 1916, for state county purposes, and a state county poll tax of one dollar and fifty cents on each poll residing in Taylor county as assessed for the year 1916. This amount when collected to be apportioned as follows:

Ten cents on each one hundred dollars as assessed and equealized for taxation along with the state county poll tax of one dollar and fifty cents be used for paying the saleries of the county officials and the incidental expenses for the year 1916. And that five cents on each one hundred dollars worth of taxable property as assessed and equealized for taxation for the year 1916, be used for paying off the pauper claims for the aforesaid year. And that thirty-five cents on each one hundred dollars as assessed and equealized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916. Four thousand, six hundred dollars ($4600.00) be used in connection with like sum from the state for the purpose of continuing the work on state roads in the aforesaid county, which are now under construction. It is further ordered by the court that there be, and there is hereby, levied an ad valorem tax of twenty cents on each one hundred dollars worth of taxable property of Taylor county as assessed and equealized for taxation for the year 1916, and

a poll tax of one dollar on each poll in Taylor county as returned by the assessor for the year 1916, for the purpose of maintaining and equiping the common schools for the year 1916.

State of Kentucky, County of Taylor, set.:

I, C. W. Ramsey, clerk of the state and county aforesaid, do hereby certify that the above is a true and correct copy of the levy made by the Fiscal Court of Taylor county, Kentucky, on the 6th day of April, for the fiscal year of 1916, the foregoing levy being duly recorded in order book No. 2, page 410 of the records of the Taylor county clerk's office.

Witness my hand this the 20th, 1916.

C. W. Ramsey,
Clerk of the Taylor County Court.

AMENDED ANSWER.—Filed May 29, 1916.

Defendants, for amendment to their answer herein, say that the county of Taylor has heretofore entered upon, and is still, continuing the work of constructing and improving public roads in Taylor county known as "state aid roads," pursuant to provisions of Sec. 4356x of the Kentucky statutes, being an act entitled, "An Act to Create and Establish a System of Public State Roads," and to provide for the construction and maintenance thereof, and which was approved on the 24th day of March, 1914, being roads which, when completed, will connect the county seats of Taylor with the county seats of the other counties. That said work began during the year 1915, and is still continuing. That Taylor county contributed moneys in the year 1915 for said work, and the state of Kentucky contributed an equal amount for the same, and that for the year 1916 Taylor county, as shown by the Fiscal Court order of April 6, 1916, to wit:

Exhibit B with the answer herein, expects to contribute during the year 1916, $4,600.00 toward the cost of said work, which amount was appropriated by said order, and will be entitled to receive from the state of Kentucky an equal amount as a contribution toward the payment for said work. And said work has thus far been done, and is being done, and is required by said statute to be done under the direct supervision and control of the state of Kentucky.

Bruce & Bullitt.

SECOND AMENDED ANSWER.—Filed May 29, 1916.

Defendants, for further answer herein, say that the construction and improvement of public roads in Taylor county known as state aid roads, and which Taylor county has begun, as stated in the first amended answer herein, is work which has been done and is continued not only under the provisions of Sec. 4356x of the Kentucky statutes, being an act entitled "An Act to Create and Establish a System of Public State Roads and to Provide for the Construction and Maintenance Thereof," approved March 24, 1914, but also under the provisions of Sec. 4356w of the Kentucky statutes, being an act entitled "An Act Declaring Certain Public Roads a System of Public State Highways, and Public Works of the State of Kentucky," approved March 24, 1914. And they further say that the Fiscal Court did heretofore, in the year 1915, pass a resolution stating the the public interest demanded the improvement of three roads, to wit:

(1) The Spurlington road from Campbellsville, the county seat of Taylor county, to the boundary line between Taylor and Marion counties, being the road from Campbellsville to Lebanon, thus connecting the county seats of Taylor and Marion counties; and,

Second Amended Answer.

(2) The Greensburg road from Campbellsville to the boundary line between Taylor and Green counties, being the road from Campbellsville to Greensburg, thus connecting the county seat of Green county, and

(3) The Saloma road from Campbellsville to the boundary line between Taylor and Larue counties, being the road connecting Campbellsville and Hodgenville, the respective county seats of Taylor and Larue counties; and did request that said roads be constructed as provided in the legislative acts aforesaid, and did in said resolution describe said roads to be constructed. And they further say that the Fiscal Court, after the passage of said resolution, did cause a survey of said roads to be made, with plans, profiles and specifications of the work as provided by said statutes, and same were submitted to the Fiscal Court of said county with an estimate of the cost of the work, and were approved by said court and were then submitted to the state commissioner of public roads of Kentucky for his approval or rejection, and were approved by him; and work was begun upon said roads in accordance with said plans and specifications, in the year 1915, and on account of such work, Taylor county contributed two thousand ($2,000.00) dollars, and the state of Kentucky contributed two thousand ($2,000.00) dollars.

Said work, however, upon said roads was not completed in the year 1915, but is to be continued during the year 1916, and Taylor county has, as shown by the order of its Fiscal Court, a copy of which has heretofore been filed, appropriated forty-six hundred ($4,600.00) dollars to be applied on account of the cost of constructing said three roads, and has applied to the state of Kentucky, in accordance with the provisions of the act aforesaid, to contribute an equal amount, to wit: Forty six hundred ($4,600.00) dollars; and the state of Kentucky has agreed to do so upon the payment by Taylor county of the forty-six hundred ($4,600.00) dollars, which it has agreed to contribute.

Defendants further say that, in accordance with the provisions of the legislative acts aforesaid, the commissioner of public roads has established rules and regulations regulating the construction and improvement of roads under said legislative acts, and Taylor county has in all respects complied with said rules and regulations, and with the provisions of said statutes; and, as aforesaid, the said construction work upon said three roads has been begun and is in progress, but has not been completed.

Demurrer.

Defendants further say that the total assessed value of property in Taylor county for the year 1916 is about two million, one hundred thousand ($2,100,000.00) dollars; and that the forty-six hundred ($4,600.00) dollars appropriated by said order of the Fiscal Court as Taylor county's contribution towards the construction of said three state aid roads is very considerably more than one-half of the total amount that will be raised under said Fiscal Court's 35-cent levy for roads and bridges for the year 1916, if all of said levy should be collected.

Wherefore, defendants pray to be hence dismissed, and for their costs.

Jeff. Henry,
Abel Hardin,
Bruce & Bullitt,
Counsel for Defendants.

W. T. Hendrickson says he is one of the defendants in the above styled action, and that the statements of the foregoing amended pleading are true.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 29th day of May, 1916. My commission expires January 29, 1920.

Katherine Arnett,
Notary Public, Jefferson County, Kentucky.

DEMURRER.—Filed May 29, 1916.

The plaintiff, Elizabeth Creager, demurs to the answer herein as amended because it does not contain sufficient denials or statement of facts to constitute a defense herein.

L. A. Faurest,
Attorney for Plaintiff.

OPINION.—Filed May 29, 1916. Walter Evans, Judge.

The plaintiff's demurrer to the defendants' answer raises questions which we have often considered and decided in the course of the many years of litigation growing out of the bonded indebtedness of Green and Taylor counties, respectively, incurred by each in aid of the construction of a certain railroad. The indebtedness of both counties is alike; it grew out of the same railroad situation and similar legislation, and the character of the resistance made by each county against the payment of the debts has been the same. We have, therefore, quite a settled jurisprudence in this connection, at least so far as this court is concerned.

The validity of the indebtedness must be regarded as having been settled by the decision of the Supreme Court in Green County v. Quinlan, 211 U. S., 582.

The routine steps taken in resisting payment after the validity of the indebtedness had been settled by the decision of the Supreme Court have been practically uniform and as follows:

First: A contest upon the validity of the bonds being hopeless, the first resistance appears when a writ of mandamus is applied for, requiring the Fiscal Court to make a levy of taxation to pay the debt.

Second: Failing to prevent the writ of mandamus, and after the taxation has been levied and proceedings for its collection have begun by putting or trying to put tax books in the hands of the sheriff, that officer either refuses to qualify, or, having qualified, resigns.

Third: A collector of state taxes is then appointed separately, which, under the law of Kentucky, is admissible.

Fourth: A collector of county taxes is then appointed, who usually refuses to accept the office if he is required to collect taxation to pay the railroad debts at the same time and under the same bond taken from him for the collection of the other county taxation, or he resigns if that requirement is made after he has qualified.

This brings the creditor to a standstill. It was perceived, however, that the county could not collect taxes for paying its other liabilities, especially the taxes necessary to pay the salaries of its officers unless a collector should be appointed, and so an attempt became customary to place all the assessments for county purposes in the hands of the collector, except that which levied taxes for the payment of the railroad bonds, and a creditor owning those bonds would find it impossible to obtain a result favorable to himself if he could not have the taxation for his benefit levied and collected simultaneously

with the other taxation by the collector, and as we thought one county debt was as sacred as another, we enforced the Kentucky statute. The county officers who wanted their salaries paid usually found that they could be elected more easily if they opposed the payment of the bonded indebtedness. Their appeal to the spirit which demanded a repudiation of the bonded indebtedness usually secured them popular favor, and it was very plain that if the taxes for the salaries of the officers and taxes for the payment of the ordinary county expenses could all be collected, and those necessary to pay the railroad bonds could be left out, things would move quite satisfactorily to those who desired to repudiate the county's bonded indebtedness. We did not concur in this plan, and concluded that this state of case should not be tolerated, inasmuch as the bonded indebtedness has been found by the Supreme Court to be a valid one. So it became our habit, under Section 4131 of the Kentucky statutes, to require the County or Fiscal Court, which ever had control of the matter, to make an assessment covering all, and to require that the collector, under such circumstances, should collect all alike, or else collect none, and in order to accomplish this, our writs of mandamus would require that there should be exacted from any sheriff or collector who collected county taxation a bond which would include alike an obligation to collect the levy for the railroad bonded indebtedness and the taxation for ordinary county expenses, including salaries of officers. In this way, and in this way only, could the creditors who held the bonds of the county have anything but a mere nominal remedy. Without such a requirement the collector would collect money to cover all the other county expenses, and its officers who got their salaries might laugh at such of its creditors as had taken its bonds. The proper local court was also required, when appointing a collector of county taxes, to make his appointment cover all alike.

Section 4131 of the Kentucky statutes provided a remedy to meet this situation, and in several instances in the course of this litigation we have heretofore endeavored to enforce that remedy in the way indicated.

The Court of Appeals in Commonwealth, etc., v. Wade's Admr., etc., 126 Ky., 791, had construed that section, and in our proceedings we have followed that construction. It afforded a good remedy for the creditors who held the county's bonds. But at the instance of the two counties named, the legislature of the state in 1906 (Sess. Acts 1906), amended Section 4131 by adding

thereto the following words: "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In Commonwealth, etc., v. Moody, 150 Ky., 571, the Court of Appeals upheld the amendment. In this case we are asked to accept and to follow that construction. We have been asked heretofore to do so, and have declined, and must again decline upon grounds similar to those controlling us in previous cases, though if the amendment to Section 4131 of the Kentucky statutes is to be applied only to debts which arise in the future, we see no reason why it might not be enforcible as to them. But as to any indebtedness which existed prior to the amendment of 1906, as the indebtedness in this case did, we must disregard that amendment and will briefly state our reasons for this conclusion:

The meaning of the language of a state constitution or a state statute, as ascertained by decisions of the court of last resort of that state, is always accepted by the federal courts as binding upon them. So are decisions of such courts as to the validity of state legislation under the provisions of the state constitution. But the federal courts are not bound by the decisions of any of the state courts as to the validity of a state statute, if the validity of such statute is challenged upon the ground that it is violative of the constitution of the United States. These propositions are so familiar as to require no citation of authorities.

The federal constitution forbids a state to enact any law which impairs the obligation of a contract. The remedy for enforcing the contract is essentially a part of the contract itself. If a remedy is provided when the contract is created, it may indeed be changed, but only on condition that one equally efficient and equally available is substituted. In this instance the amendment to Section 4131 of the Kentucky statutes took away the only efficient remedy left the holder of any of the bonds of Taylor county, and instead of providing another equally efficient, left those creditors helpless, or at least dependent upon the caprice of the County Court. It is so plain that this cannot be constitutionally done that we have felt constrained to hold that the creditors who held the railroad bonds of the county were entitled to the remedy as it existed previous to the passage of the amendment of 1906, and especially as Section 4131 which gave that remedy had been upheld in Commonwealth, etc., v. Wade's

Opinion.

Admr., 126 Ky., above referred to, which was decided in 1907, but in an action which arose before 1906.

Of course, school taxes (which the Kentucky Court of Appeals has held to be state taxes) will not be affected by this ruling, but will be excepted from it, as will be shown in the judgment herein.

It is insisted that the road taxation provided for in the act approved March 24th, 1914 (Acts 1914, 441), is a state tax and stands upon the same footing as the school tax. So far as the taxation of five cents on the $100.00 provided for in Section 4 of that act is concerned, the contention is sound, and we cannot and shall not, by our judgment in this case, interfere with that taxation or its collection, but Section 21 of the same act provides that any road constructed or reconstructed under its provisions shall forever be a county road, and "the duty of keeping the same in repair devolves upon the Fiscal Court of the county to be maintained out of the general county fund as proveded by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said Fiscal Court."

This act refers to state aid roads, which constitute only a small per cent of the county roads. The expense of maintaining the roads not aided by the state is, of course, a county matter.

It is thus quite clear that the taxation imposed by the Fiscal Court of a county for the purpose of constructing or reconstructing roads is a county expenditure, and not a state indebtedness, and, consequently, that the school tax decision has no bearing upon the question.

The demurrer to the answer is sustained, and if the defendants do not answer further, or manifest a desire to do so, judgment, as prayed for, will be entered.

Walter Evans, Judge.

JUDGMENT GRANTING MANDAMUS.—Filed May 29, 1916, Walter Evans, Judge.

This day came defendants and filed an answer, an amended answer, and a second amended answer. Then came the plaintiff, Elizabeth Creager, by attorneys, and filed a demurrer to the said answer as amended. Said demurrer having been argued by counsel and considered by the court, and the court being sufficiently advised, delivered its opinion in writing, which is filed, and pursuant thereto, it is ordered that said demurrer be, and it is sustained, to which defendants except.

The defendants failing to plead further, and this cause coming on for hearing upon the motion heretofore made herein for a mandamus, and the court being advised, it is ordered that said motion be, and it is, sustained; and it is further ordered and adjudged that the defendants, W. T. Hendrickson, county judge of Taylor county, Kentucky; and W. H. Bennett, J. D. Jones, L. Morgan, A. W. Miller, Ruel Eads and T. A. Wise, justices of the peace of Taylor county, be, and they are hereby, commanded and required to assemble in and as the Fiscal Court of said Taylor county, on the 20th day of June, 1916, and levy a tax upon the property in said county of Taylor subject to taxation in said county sufficient to pay one-third of the judgment hertofore obtained by the plaintiff, Elizabeth Creager, in this court against said Taylor county, and the costs of this action, for the purpose of paying said portion of said judgment and the costs of this action. Said judgment referred to above is for the sum of thirteen thousand, four hundred and fifty-seven and 50-100 dollars ($13,457.50), with interest thereon from October 11, 1915, and the further sum of $25.41, costs of said action recovered by the said plaintiff.

It is further considered, ordered and adjudged that the said defendants and their successors in office, as the Fiscal Court of Taylor county, in the year 1917, levy a tax upon the property in said Taylor county subject to taxation in said county for the taxes for the year 1917, sufficient to pay another one-third of the said judgment heretofore obtained by the plaintiff against Taylor county, and the cost of collecting said tax, for the purpose of paying said portion of said judgment:

And it is further ordered that said last mentioned levy be made at the same time and by the same order by which all other taxes levied by said Fiscal Court for the year 1917 are levied.

It is further ordered that the said defendants and their successors in office, as the Fiscal Court of said Taylor county, in the year 1918, levy a tax upon the property in

POOR COPY

said county of Taylor subject to taxation in said county for the year 1918 sufficient to pay the other one-third of the said judgment heretofore obtained by plaintiff against said Taylor county and the cost of collecting said tax, for the purpose of paying said portion of said judgment. And it is further ordered that said last mentioned levy be made at the same time and by the same order which all other taxes levied by said Fiscal Court for the year 1918 are levied.

It is further considered, ordered and adjudged that the said W. T. Hendrickson, county judge of Taylor county, and any successor in said office of county judge of said county, constituting the County Court of said county, be, and he is hereby, commanded and required, whenever a collector of any tax is levied, or which may hereafter be levied, by the said Fiscal Court of said county, is appointed, to embrace in the order of appointment of said collector that said collector shall be required to collect the taxes that are levied or that may be levied by said Fiscal Court to pay plaintiff's judgment aforesaid against said county of Taylor, and to require said collector, so appointed, to execute one bond for the collection of any and all of the taxes levied by said Fiscal Court, including the said taxes levied to pay plaintiff's said judgment, and the said defendant and his successors in office shall continue so to do until plaintiff's said judgment and her costs have been paid in full.

It is further ordered that the defendants herein, and their successors in office, should there be any, constituting the Fiscal Court of said county of Taylor, shall assemble as such once in every three months, and order and have paid to the plaintiff on her said judgment such a portion of said taxes levied by said court as the rate of taxation that may be levied to pay plaintiff's judgment or the portion thereof for which a levy or levies have been made at said time bears to the rate of taxation levied by said court for all purposes, and shall continue so to do until plaintiff's said judgment has been satisfied.

This judgment and order shall not apply in any way to any tax levied or that may be levied for school purposes, nor to the collection thereof, nor shall it apply to the collection of the state tax of five cents on the one hundred dollars of taxable property levied by Section 4356X, subsection 4, of Kentucky Statutes.

It is further ordered that the plaintiff recover of the defendants her costs herein expended.

This cause is reserved and retained on the docket for the purpose of entering such orders and taking such pro-

ceedings as may be necessary or proper to enforce the levy and collection of said taxes herein ordered levied and collected.

To all of which the defendants except.

ASSIGNMENT OF ERRORS.—Filed June 27, 1916.

Defendants herein complain that the court, in trying and determining the above styled cause, erred to the prejudice of defendants as follows:

1. In sustaining the demurrer to the answer of defendants.

2. In holding that the amendment made by the legislature of Kentucky in 1906 to Section 4131 of the Kentucky Statutes, as it previously existed, would, in enforced, impair the obligation of the contract between plaintiff and Taylor county, and is unconstitutional.

3. In commanding the defendant, W. T. Hendrickson, as county judge of Taylor county, and any successor in said office, whenever a collector of any tax levied, or which may hereafter be levied, by the Fiscal Court of said county (except school taxes), is appointed, to embrace in the order of appointment of said collector that he shall be required to collect the taxes levied, or to be levied, to pay plaintiff's judgment, and shall execute one bond for the collection of all taxes levied by the Fiscal Court, including the taxes levied to pay plaintiff's judgment; and in commanding said county judge, and his successors in office, to continue so to do until plaintiff's judgment and his costs have been paid in full.

4. In refusing to exclude from the taxes which the collector appointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect, and for which he is required to give bond, taxes levied by Taylor county for the purpose of helping to build

and maintain the public roads of Taylor county which are being constructed pursuant to the provisions of Section 4356w of the Kentucky Statutes, 1915 edition, being an act entitled "An act declaring certain public roads a system of public state highways, and public works of the state of Kentucky," approved March 24, 1914, and Section 4356w of the Kentucky Statutes, 1915 edition, being an act entitled "An act to create and establish a system of public state roads and to provide for the construction and maintenance thereof," approved March 24, 1914.

5. In refusing to exclude from the taxes which the collector appointed to collect the taxes to pay plaintiff's judgment and other county taxes is required to collect, and for which he is required to give bond, taxes levied by Taylor county for the purpose of building and maintaining the public roads of Taylor county.

6. In controlling the discretion which the county judge of Taylor county has by the Statutes of Kentucky, as construed by the Court of Appeals of Kentucky in appointing collectors of revenue, and in refusing to allow said county judge to fix and name, as he might deem proper, in the order appointing such collector of taxes, what taxes such collector should collect, and for which he should give bond.

7. In ordering that the defendants and their successors in office, constituting the Fiscal Court of Taylor county, should once in each three months, or at all, order and have paid to plaintiff on his judgment such portion of said taxes levied by said court as the rate of taxation levied to pay plaintiff's judgment, or the portion thereof for which a levy or levies have been made at said time, bears to the rate of taxation levied by said court for all purposes.

Wherefore, defendants pray that the judgment entered in the above styled cause on May 29, 1916, be reversed.

Abel Harding,
Helm Bruce,
Attorneys for Defendants.

BOND.—Filed June 27, 1916.

Know all men by these presents, that we, W. T. Hendrickson, judge of the Taylor County Court, Kentucky, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads, and T. E. Wise, justices of the peace of Taylor county, Kentucky, principals; and Maryland Casualty Company, surety, are held and firmly bound unto Elizabeth Creager, in the sum of two hundred ($200.00) dollars, to be paid to said Elizabeth Creager, or her executor or administrator, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators.

Sealed with our seals and dated this 27th day of June, A. D., 1916.

Whereas, the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, have prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment rendered in the above styled cause by the District Court of the United States for the District of Kentucky at Louisville.

Now, therefore, the condition of this obligation is such that if the above named W. T. Hendrickson, J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, shall prosecute their said writ of error to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

W. T. Hendrickson,
J. D. Jones
W. H .Bennett,
A. W. Miller,
L. Morgan,
Ruel Eads,
T. E. Wise,

All the foregoing by Helm Bruce, Attorney.

Maryland Casualty Company,
C. W. Jefferson,
Attorney-in-Fact.

[Seal]

Approved June 27th, 1916.
Walter Evans,
Judge.

ORDER ALLOWING ASSIGNMENT OF ERRORS AND WRIT OF ERROR.—June 27, 1916.

This day came the defendants in the above styled cause and tendered their assignment of errors and their petition for a writ of error from the United States Circuit Court of Appeals, and it is now ordered that said assignment of errors be filed and said writ of error be allowed, upon the execution of a bond in the sum of two hundred dollars, not to operate as a supersedeas. Thereupon appeared the defendants and tendered said bond in the sum of two hundred dollars, with the Maryland Casualty Company, of Baltimore, Maryland, as surety, which bond is hereby approved and ordered filed.

PRAECIPE FOR TRANSCRIPT.—Filed June 27, 1916.

The clerk will copy into the transcript on the writ of error herein the following papers, to wit:

1. The petition for mandamus.
2. The answer and the first and second amended answers.
3. The demurrer.
4. The opinion of the court filed May 29, 1916.
5. The judgment of the court.
6. The assignment of errors.
7. The petition for writ of error.
8. The appeal bond.
9. The citation and return thereon.
10. This praecipe.
11. Order allowing writ of error and approving bond.

Helm Bruce,
Attorney for Defendants.

Service of praecipe accepted, June 29, 1916.

L. A. Faurest,
Attorney for Plaintiff.
By John P. Haswell, Jr.,
Attorney.

CLERK'S CERTIFICATE.

I, A. G. Ronald, clerk of the District Court of the United States, for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 32 pages contain a true and correct transcript of the record and proceedings in the case of W. T. Hendrickson et al, v. Elizabeth Creager, Number 235, copied in accordance with the praecipe to be found on page 32 of this record, as the same appears from the files and record in my said office.

Witness my hand and the seal of said court this 11th day of July, A. D., 1916.

A. G. Ronald,
Clerk.

[Seal]
[Ten-cent revenue stamp attached.]

PETITION FOR WRIT OF ERROR.—Filed June 27, 1916.

Defendants, W. T. Hendrickson, judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise justices of the peace of Taylor county, and, with said judge of the County Court, constituting the Fiscal Court of Taylor county, do hereby petition the court for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to bring in review before that court the judgment entered in the above styled cause on May 29, 1916, and the record therein.

Helm Bruce,
Attorney for Defendants.

Allowed: June 27, 1916.
Walter Evans,
Judge.

CITATION.

United States of America, Western District of Kentucky, Sixth Judicial Circuit, ss.:

To Elizabeth Creager, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit on the 25th day of July next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein W. T. Hendrickson, judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county (Kentucky), plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 27th day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

[Seal] Walter Evans,
Judge.

Service of citation accepted June 29, 1916.

L. A. Faurest,
Attorney for Plaintiff.
By John P. Haswell, Jr.,
Attorney.

WRIT OF ERROR.

The United States Circuit Court of Appeals for the Sixth Circuit.

The United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable Judge of the District Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said

Writ of Error.

District Court, before you, or some of you, between Elizabeth Creager, plaintiff, and defendants, W. T. Hendrickson, judge of Taylor County Court and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, justices of the peace of Taylor county (Kentucky), a manifest error hath happened to the great damage of the said defendants as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you may have the same at Cincinnati, Ohio, in said Circuit on the 25th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States this 27th day of June, A. D., 1916, and in the 140th year of the independence of the United States of America.

Allowed by

Walter Evans,
United States District Judge.

[Seal]

A. G. Ronald,
Clerk of the District Court of the United States for the Western District of Kentucky.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPEARANCE OF COUNSEL—Filed July 28, 1916.

William C. Cochran,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiffs in Error.

Helm Bruce.

MOTION TO ADVANCE CAUSE—Filed Oct. 3, 1916.

Plaintiffs in error in each of the above entitled causes file duly accepted notice to counsel for defendants in error therein, and move the court to advance each of the said causes for an early hearing and decision on account of the public interest in the questions therein involved, and file an affidavit in support of the motions.

Bruce & Bullitt,
Attys. for Plffs. in Error.

AFFIDAVIT IN SUPPORT OF MOTION TO ADVANCE—Filed Oct. 3, 1916.

AFFIDAVIT OF W. T. HENDRICKSON.

W. T. Hendrickson, being duly sworn, and in support of a motion to advance the five above entitled causes for hearing, says:

I am the Judge of the Taylor County Court (of Kentucky), and one of the plaintiffs in error in each of the said causes.

I have honestly and in good faith endeavored to obey and carry into execution the judgment of the United States District Court in each of said causes; and the other members of the Fiscal Court of Taylor County have done likewise.

Said Fiscal Court, of which I am ex officio a member as County Judge, and am the presiding officer, did, on June 20, 1916, in obedience to the judgment in each of said causes, levy an ad valorem tax on all the property in Taylor County subject to taxation, sufficient to pay the amounts required by said judgments to be paid.

On the same day, to-wit, June 20, 1916, the office of sheriff of Taylor County being vacant, and there being no collector for taxes, except State taxes, in Taylor County, the Taylor County Court, of which I was, and am, the Judge, made an order appointing Robert L. Faulkner collector of taxes, other than State taxes, and ordered him, in conformity with the judgment of said court in each of said causes, before entering upon his duties as collector, to make and enter into one single bond, conditioned that he would collect and properly account for the taxes levied, in obedience to the judgments in said causes, and also all taxes, except that levied for schools, under the levy made by the Fiscal Court for the general purposes of the county, all in strict obedience to, and in exact conformity with the order of the said District Court in each of said causes.

Said Faulkner was, and is, a reputable and responsible man of considerable wealth, and one of the best and most influential citizens of Taylor County. And I have understood that he is in favor of paying Taylor County's bonded debt, or such part of it as the county is able to pay. But said Faulkner failed and declined to give bond, or to qualify as collector aforesaid.

After the refusal of said Faulkner to accept said office of collector, or qualify himself to fill it, the County Court

at its August term, to-wit, August 10, 1916, the office of sheriff still being vacant, and there being no collector of taxes, except State taxes, made an order appointing E. N. Tucker collector of taxes, other than State taxes, and directed him, in conformity with the judgment of the court in each of said causes, to execute one single bond for the collection of the taxes levied to pay said judgments, and also to collect the taxes levied for general county purposes.

Said Tucker is also a substantial man, and one of the leading citizens of Taylor County, and understood to be in favor of paying the bonded debt of Taylor County, or such part of it as the county can pay. But said Tucker failed and refused to accept the office, or to qualify himself to fill the same by executing the bond required of him.

I have at all times been willing, and am now willing, as Judge of the Taylor County Court, to appoint any reputable man who may be recommended to the office of collector of taxes in Taylor County, and who may be suggested as being willing to accept said office and qualify by executing the character of bond required by the order of the court in said cases. But no such man has been recommended to me, other than those I have heretofore appointed, as aforesaid, and I know of no one to appoint who, there is any reason to believe, will accept the said office and give the character of bond required.

The result of the impossibility of getting any one to accept the office of tax collector under the conditions required by the judgments in said cases is that no taxes for county purposes of any kind are being collected, or can be collected, in Taylor County, and the public roads and bridges are necessarily being allowed to go unrepaired, and there are no funds to pay for the maintenance of the court house and the jail, and other public properties of the county, or to pay any of the officers of the county for the performance of their official duties.

In other words, the effect of the judgments of the District Court in said cases has been to paralyze the county government of Taylor County, and, at the same time, to accomplish nothing towards the collection of money wherewith to pay any of said judgments.

It is of the utmost importance to Taylor County, and the people thereof, that said causes be speedily heard and determined, so that if it should be decided that the judgments of the District Court therein are erroneous, and that the County Court has a right to appoint a collector

of taxes levied for general purposes, and to permit him to qualify by giving bond for the collection of such taxes, and to appoint a different collector to collect the taxes levied to pay said judgments, as affiant believes the Statutes of Kentucky authorize, this may be speedily done, and the means be thereby procured for carrying on the governmental functions of said county.

W. T. Hendrickson.

Subscribed and sworn to before me by W. T. Hendrickson this 28 day of September, 1916.

M. W. Tucker,
Notary Public, Taylor County, Kentucky.

(Seal)

My commission expires Feby. 16, 1920.

STIPULATION THAT CAUSES BE HEARD TOGETHER—Filed Oct. 28, 1916.

It is hereby agreed between the respective counsel for plaintiffs in error and defendants in error that the five above entitled causes, which involve the same questions, may be heard together.

Helm Bruce for Plffs. in Error.
L. A. Faurest for Elizabeth Creager,
Hugh S. Gardner for Mildred E. Hocker
Defts. in Error.
W. O. Harris, Jr., for Apperson and Sterling Land & Investment Co., Defts. in Error.

Order Entry

ORDER CONSOLIDATING CAUSES FOR HEARING
—Filed Nov. 10, 1916.

Ordered that since the five above entitled causes involve the same questions they shall be heard and submitted in this court together.

ENTRY—CAUSES ARGUED AND SUBMITTED—Dec. 5, 1916—Before Warrington, Knappen and Denison, C. JJ.

These causes are argued together by Mr. Helm Bruce for the Plaintiffs in Error and by Mr. L. A. Faurest, Mr. W. O. Harris, Jr., and Mr. Lewis Apperson for the Defendants in Error and are submitted to the court.

JUDGMENT—Filed Dec. 15, 1916.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

W. T. Hendrickson, Judge, etc., et al

vs. No. 2948.

Elizabeth Creager.

Error to the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

OPINION—Filed Dec. 16, 1916.

Filed Dec. 16, 1916, Wm. C. Cochran, Clerk.

Nos. 2947-2951.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

W. T. HENDRICKSON, Judge of Taylor County Court, and J. D. JONES, W. H. BENNETT, A. W. MILLER, L. MORGAN, RUEL EADS and T. E. WISE, Justices of the Peace of Taylor County, Kentucky,

Plaintiffs in Error.

No. 2947 v.

LEWIS APPERSON,

Defendant in Error.

SAME

No. 2948 v.

ELIZABETH CREAGER.

SAME

No. 2949 v.

HUGH S. GARDNER.

SAME

No. 2950 v.

MILDRED E. HOCKER.

SAME

No. 2951 v.

STERLING LAND AND INVESTMENT COMPANY.

ERROR to the District Court of the United States for the Western District of Kentucky.

Submitted December 5, 1916.

Decided December 15, 1916.

Opinion

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

PER CURIAM. It is here sought to reverse five judgments in mandamus. They were rendered in separate cases which involved the same questions and were decided at the same time. The proceedings in error were heard together here and are passed upon in this opinion. The plaintiffs in error constitute the Fiscal Court of Taylor County, Kentucky, and the peremptory order in each case in terms requires them and their successors, if any, in office: (1) to convene the court at stated times in 1916, 1917 and 1918, and to levy a tax upon the taxable property of the county, payable in three annual installments, sufficient in the aggregate to pay certain unsatisfied judgments which the defendants in error had severally recovered against the county; (2) to place the appropriate tax bills for collection under each levy in the hands of the sheriff, and his successor, if any, in office; and, upon failure of the sheriff to qualify, the order in each instance directs (3) the county judge, and his successor, if any, in office, constituting the county court, to take steps necessary to collect such tax when appointing a collector of taxes.

The cases, except as to a road tax, are controlled by the decisions of this court in *Tucker* v. *Hubbert*, 196 Fed. 849, and *Graham* v. *Quinlan*, 207 Fed. 268, unless error was committed, as counsel claim, in the decision in *Graham* v. *Quinlan*. The contention is that we there erroneously construed the decison in *Commonwealth* v. *Moody*, 150 Ky. 571, touching the effect of an amendment made March 15, 1906, to section 4131 of the Statutes of Kentucky. Acts 1906, p. 153 (sec. 3); 2 Ky. Stat., Carroll ed. 1915, sec. 4131(3). The error so claimed concerns a further portion of each order. These orders also provide in substance that when the county judge, or his successor, if any, in office, shall appoint a collector of taxes, he shall embrace in the order of appointment a direction to the officer to collect in addition to the usual levies of taxes also the levies to pay the judgments mentioned, and shall exact of the collector a single bond to secure collection of all the levies. Each order, however, excepts any levy made by the fiscal court for school purposes, and also "the five cents on each one hundred dollars of state revenue for the construction of public roads."

In *Graham* v. *Quinlan* (at p. 272) we considered the decision in the Moody case, and we do not see any sufficient reason to change the views we there expressed,

either as to that decision or the effect of the amendment of 1906. It is true that the amendment in terms relieves the collector of any duty "to give bond for and collect" taxes not "mentioned or provided for in the order of the county court appointing him." Before the amendment no special certification of the county levy was required to be made to the sheriff or collector in order to make the tax collectible by either; it was the duty of each to take notice of levies made by the fiscal court, and to collect and apply the taxes; and the failure of either to do so rendered the defaulting official responsible under his bond (*Commonwealth* v. *Wade's Adm'r*, 126 Ky. 791, 801). The amendment was in form appropriate to ameliorate this condition at least as to the collector; it relieved him, as well as his sureties, from the peril of overlooking existing levies; but the language fails to indicate any purpose to do more than this, save only to impose upon the county court a duty of certification of levies when appointing a collector. The amendment did not change the purport or effect of any levy itself. A tax levy imports a necessity for its existence and a purpose to collect it. The power to impose a tax would be futile in the absence of effective means for its collection. Upon the sheriff's failure to qualify, the county judge, in his capacity as the county court, is empowered to appoint a collector of taxes; and the amended section, by clear implication, devolves a duty upon the county court exercising this power to provide in its appointing order for the collection of the existing county tax levies. This, as it seems to us, is the natural import and meaning of the amended section in its entirety, and, consequently, is expressive of the legislative intent. It is insisted, however, that the amendment empowers the county court to appoint two or more collectors and to mention or provide for the collection of such taxes, and such only, in the several orders of appointment as the court shall deem fit; and, aside from the road tax before alluded to, this is the effect of the only defense here offered. It is particularly to be noticed that no objection is made to the portions of the peremptory orders that require levies to be made to pay the unsatisfied judgments; the complaint is that the orders collectively, as well as separately, restrict the county court to the appointment of a single collector with a single bond. Certainly the words comprised in the amendment itself do not in terms vest any appointing power. The right to appoint a plurality of collectors of taxes ought to be traceable to some distinct

legislative authority. The only language expressly creating the power of appointment is contained in the old portion of section 4131 and remains unchanged; and, as already indicated, the construction which that language received in the Wade case (126 Ky., at 799), limiting the power of appointment to a single collector to collect the county revenue, including any special assessment, ought to be followed unless the decision in the Moody case requires a different construction. The only issue involved in the Moody case was whether Moody, who had been appointed as a special tax collector after the amendment of 1906, was responsible for failure to collect a tax not mentioned in his order of appointment. Plainly, this did not call for a construction of the appointing power; it concerned only the effect of omission to mention a particular tax in an appointing order. It is clearly to be inferred from the records in the instant cases, not to speak of the records in *Tucker* v. *Hubbert* and *Graham* v. *Quinlan*, that no person would accept an appointment and furnish a bond, with responsible sureties, to collect simply and solely a tax levy to pay these judgments; in short, the logic of the interpretation urged in behalf of plaintiffs in error is to impute to the legislature a purpose to sanction repudiation of acknowledged county indebtedness. We can not accept this view. We can not believe that language appropriate to require certification of tax levies to a tax collector for the protection of himself and his sureties was intended also to justify multiplying collectors and distributing the items of levy among them at the will or the caprice of the appointing official. The complaint at bottom is not that the services in themselves are too great for a single collector; it is that they are affected by the existence of bitter opposition to payment of these unsatisfied judgments. The circumstance that such hostility prevails in a particular county against a single item of its tax levy can not stand as a warrant for severance of the levy. The statute is a general law and must have uniform operation throughout the state. The plaintiffs in error can not be heard both to concede the levy to pay these judgments to be right and affirm its collection to be wrong. Simple justice and good conscience, as also the law, require provision to be made for a single agency and guaranty to collect this tax as a unitary portion of the regular county levy; and if collection of those portions of the levy which the taxpayers are willing to pay can not be effected in this way, the fault must lie with the county itself. Our conclusion, of

course, renders it unnecessary to consider the question determined below whether the effect of the amendment was to destroy an existing remedy, without substituting one equally efficacious, to enforce collection of the judgments, and so operated to impair the contracts.

It remains to consider whether the road tax to which allusion has been made is a state tax and not a county tax. Here again counsel lay stress upon the question of collectorship. If the tax is a county tax, its collection will fall within the province of the county tax collector; but if it is a state tax, its collection must be made through the state tax collector who appears to have been appointed by the county court January 24, 1916. The road tax is one of the items of the general county levy, to-wit:

"That thirty-five cents on each one hundred dollars as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor County for the year 1916, four thousand six hundred dollars ($4600) be used in connection with like sum from the state for the purpose of continuing the work on the state roads in the aforesaid county, which are now under construction."

It is the item of $4,600 thus provided for that is in dispute. The statutes that are pertinent here were enacted by the legislature of Kentucky on March 24, 1914; and since the first act is dependent for its execution upon the second, the two acts must necessarily be considered together. One is entitled "An act declaring certain public roads a system of public state highways, and public works of the State of Kentucky." The other statute is entitled "An act to create and establish a system of public roads and to provide for the construction and maintenance thereof." Acts 1914, pp. 440, 441; 2 Ky. Stat., Carroll ed., 1915, sections 4356w, 4356x. The first of these acts provides that the system of highways to which it in terms relates shall consist of roads connecting county seats of adjoining counties within the state, and also county seats of state border counties with those of adjoining counties in the adjacent states. The second act invests the commissioner of public roads with general supervision of all public roads and bridges that "are being constructed, improved or maintained in whole or in part by aid of state money," and would seem to include roads designed to connect county seats provided for in the first act (subsections 1 and 2 of second act).

Further provision is made for raising money through taxation for the purpose of furnishing such state aid and for apportioning the money among the several counties applying for state aid. It is not necessary to recite the details of the second act, since it distinctly provides (subsection 21):

"Any road constructed or reconstructed under the provisions of this act shall forever hereafter be a county road and the duty of keeping the same in repair devolves upon the fiscal court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said fiscal court."

Thus, the plan considered as an entirety would seem to provide for state aid of county roads rather than county aid of state roads. It is true that both of these acts in general terms call the roads there mentioned "public state highways," yet this is consistent with the specific provision, just quoted, which expressly invests every such road with the characteristics of "a county road," and requires their maintenance later by the several fiscal courts of the counties. It was manifestly quite as competent for the law-making body to provide that these highways should each be a county road as it was to provide that they should receive state aid. All public roads are in one sense state highways, since the general rule is to provide for their construction, improvement and repair through local agencies created in pursuance of legislative enactment; but here the purpose to treat these highways as local roads is distinct. It results, we think, that taxes levied as here by county agencies are county taxes and are to be collected by the county tax collectors. We discover nothing in the statutes in question which would prevent any of the counties from securing such state aid under levies and collections of taxes made through purely county agencies. Indeed, the facts alleged in the pleadings of the instant cases and by general demurrer admitted, set out a plan to secure state aid under these statutes through appropriation and use of the $4,600 in dispute. The plan relates to "the improvement of three (named) roads" which are designed to connect the county seat of Taylor County with the county seats of certain adjoining counties. The aid sought is under an arrangement alleged to have been made with its officials whereby the state is to contribute

a like sum ($4,600) for the same object. In other words, the total sum of $9,200 is intended to be secured and applied toward the improvement of these roads. Unless the desired aid is to be obtained in this way, it can not under the present records be secured. If the plan of Taylor County had been to issue bonds under the acts sufficient to procure the total sum desired ($9,200), and to use the money in the improvement of the three roads before applying for state aid, the county might after executing the plan have secured state aid to the same extent as it now proposes, and then have applied the sum so received from the state to ordinary county objects (*Mitchell* v. *Knox County Fiscal Court*, 165 Ky. 543, 550-553); and this tends strongly to support the conclusion that the road tax in question is a county tax and not a state tax. The claim of analogy between the instant tax and an ordinary school tax fails. The road tax originates with the fiscal court, the school tax with the board of education; the object of the road tax is to construct or improve county roads, the object of the school tax is to procure and support an exclusively state system of public schools (*City of Louisville* v. *Commonwealth for School Board*, 134 Ky. 488, 494; *Ramsey* v. *County Board of Education*, 159 Ky. 827, 831, 832).

It follows that the judgment in each of the cases must be affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of W. T. Hendrickson, Judge, etc., et al., v. Elizabeth Creager, No. 2948, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of February, A. D. 1917.

William C. Cochran,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

(Seal)

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. T. Hendrickson, Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads and T. E. Wise, Justices of the Peace of Taylor County, Kentucky, are plaintiffs in error, and Elizabeth Creager is defendant in error, No. 2948, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss.*

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the *the* record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 31st day of March, A. D. 1917, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals.

No. 2948.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, Plaintiff in Error,

vs.

ELIZABETH CREAGER, Defendant in Error.

Stipulation.

It is hereby stipulated that the certified copy of the transcript of record in the above entitled cause, heretofore filed in the Supreme Court of the United States, with a petition for a writ of certiorari, may be taken as a return to said writ.

L. A. FAUREST,
Att'y for Def't in Error.
HELM BRUCE,
Att'y for Pl'ff in Error.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said Circuit this 31st day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 25,805. Supreme Court of the United States. No. 975, October Term, 1916. W. T. Hendrickson, Judge, etc., vs. Elizabeth Creager. Writ of Certiorari. Filed Mar. 29, 1917. Wm. C. Cochran, Clerk U. S. C. C. A., 6th Cir.

[Endorsed:] File No. 25,805. Supreme Court U. S., October term, 1916. Term No. 975. W. T. Hendrickson, Judge, etc., Petitioner, vs. Elizabeth Creager. Writ of certiorari and return. Filed April 3, 1917.

Office Supreme Court, U. S.
FILED
MAR 7 1917
JAMES D. MAHER
CLERK

No. 9[illegible]428

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner,

versus

ELIZABETH CREAGER, - - - - Respondent.

Petition for a Writ of Certiorari and Brief in Support of the Petition.

HELM BRUCE,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1916.

W. T. HENDRICKSON, ET AL., - - *Plaintiffs in Error,*

versus

ELIZABETH CREAGER, - - - - - *Defendant in Error.*

NOTICE.

Notice is hereby given that on Monday, March 12, 1917, at the opening of court on that day, W. T. Hendrickson, plaintiff in error in the above-entitled cause, will submit to the Supreme Court of the United States in the city of Washington, D. C., a petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, in said cause; and a copy of said petition, and of the brief in support thereof, is herewith served upon you.

HELM BRUCE,
Counsel for W. T. Hendrickson.

Service of the foregoing notice, and of a copy of the petition and brief therein referred to, is hereby acknowledged, this 21st day of February, 1917.

L. A. FAUREST,
Counsel for Elizabeth Creager.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - - *Petitioner,*

versus

ELIZABETH CREAGER, - - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

W. T. Hendrickson, who is the Judge of the County Court of Taylor County, Kentucky, presents this petition for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to review its judgment in a case wherein that court affirmed a judgment of the United States District Court for the Western District of Kentucky, in a cause wherein respondent herein was plaintiff, and this petitioner and others were defendants, and wherein said District Court granted a mandamus at the instance of respondent against this petitioner.

A certified copy of the entire transcript of the record in said cause, including the proceedings in the said

Circuit Court of Appeals is presented with this petition, as an exhibit thereto.

As shown by a comparison between the opinion of the Circuit Court of Appeals, contained in said record, and the opinion of the Court of Appeals of Kentucky in the case of Commonwealth v. Moody, 150 Ky. 571, there is a direct conflict between them as to the true construction of a statute of Kentucky, regulating, and vitally affecting, county government in the State of Kentucky, and vitally affecting the duties of this petitioner as Judge of the County Court of Taylor County, Kentucky.

THE MATTER INVOLVED.

Respondent is a creditor of Taylor County, Kentucky. Judgment was obtained on the debt against that county in the United States District Court for the Western District of Kentucky, upon which execution was issued, and was duly returned, in substance and effect, "no property found." Respondent then instituted another action in the same court against petitioner as the Judge of the County Court of Taylor County, and against the several Justices of the Peace of that county, which Judge and Justices constitute the Fiscal Court of the county, in which a mandamus was sought against those officers, directing them to levy a tax upon the taxable property in the county, sufficient to pay the judgment against the county. To this part of the prayer for relief there was never any objection on the part of the officers of the county; and when the judgment was entered commanding the levy, it was promptly made.

But respondent (plaintiff therein) prayed for and obtained more than a judgment simply directing the levy of the tax to pay the debt. The facts concerning the additional prayer and the additional relief obtained are as follows:

By the Statutes of Kentucky the sheriff of a county is the collector of both State and county taxes in his county. But in Taylor County, owing to an unfortunate condition of affairs, there has been no sheriff for many years. In this contingency, the statute makes it the duty of the County Court to provide for the collection of taxes by appointment of a collector, or collectors.

The statute in question is §4131 of the Kentucky Statutes (Edition of 1915), and is as follows:

> "§4131. On the failure of the sheriff or collector to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the County Court may appoint a sheriff or collector to fill the vacancy until a sheriff or collector is elected, or it may appoint a collector for the county of all moneys due the State, county or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of all the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the County Court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the County Court, and if the bond be not executed within said time the appointment of another collector may in like manner, be made and qualified; but such collector shall only be required to give bond for and collect

such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

The Court of Appeals of Kentucky, in the case of Commonwealth, etc., v. Moody, 150 Ky. 571, in construing the statute just quoted, has held that the County Court can, if it sees proper, appoint two, or more, collectors for taxes due the county, specifying in each order of appointment just what taxes are to be collected by the appointee therein named, and taking from each appointee a bond to collect the taxes specified in his order of appointment; that the County Court may, therefore, appoint one collector to collect taxes levied for ordinary county governmental purposes, and take from him a bond to collect those taxes, and a different collector to collect taxes levied to pay the debts of the county, and take from him a bond to collect those taxes.

But the respondent herein, in the petition filed in the District Court, relying upon two opinions in cases formerly decided by the United States Circuit Court of Appeals for the Sixth Circuit, in which a different view was taken as to the construction of this statute, prayed for an order commanding the County Judge that, when he should next appoint a collector, whose duty it should be to collect *any* county tax, levied for *any purpose,* he should embrace in that order of appointment a direction to the appointee to collect *the levy made to pay plaintiff's judgment,* and the levy made to pay any other item of county tax, and further commanding the County Judge to take from such appointee "*but one and a single bond*

to cover the collection of the levy made to pay this judgment, as aforesaid, and the item or items of any levy made by the Fiscal Court of Taylor County *for any other purpose*" (Rec., 4).

Petitioner, as defendant to that action, answered to the effect that, under the statute of Kentucky, as construed by the Court of Appeals of Kentucky, "the County Court of Taylor County has a discretion as to whether it will appoint one person to collect all moneys due the State and the county, and taxing districts therein, or as to whether it will appoint separate collectors and designate in the order of appointment of each collector what he shall collect, including the right and discretion to appoint one collector to collect taxes levied by the Fiscal Court of the county for ordinary county purposes, and another collector to collect taxes levied by the Fiscal Court for other purposes, such as the payment of judgments against the county, and to direct in each order of appointment what taxes the appointee thereunder shall collect, and for the collection of which he should be required to give bond." And he submitted that the United States District Court could not, by its judgment, control the discretion of the County Court of Taylor County, given it by the Statutes of Kentucky as construed by the Court of Appeals of that State (Rec., 6).

A demurrer to the answer was sustained, whereupon the petitioner declined to plead further, and a judgment was entered, in conformity with the prayer of the petition, in effect requiring petitioner, when he, as Judge of the Taylor County Court, should next appoint a collector

to collect *any county taxes* which had been levied by Taylor County, to provide in the order appointing such collector, that he should collect the taxes which had been levied *to pay the judgment of plaintiff* in said action (the present respondent); and that petitioner should take from such collector *but one bond covering the collection of all county taxes.*

Several other actions of exactly similar kind were brought at the same time with the action of the respondent herein; and in each of them the same character of judgment was entered, which was affirmed by the United States Circuit Court of Appeals; and a petition for a writ of certiorari is being presented by this petitioner in each of said causes, contemporaneously with the presentation of this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner, as Judge of the Taylor County Court, is in this position:

Under the opinion of the Court of Appeals of Kentucky, the highest court of that State, he has the right to appoint a collector of taxes levied by Taylor County for ordinary governmental purposes, such as keeping up the court house and the jail, etc., and to appoint a different collector to collect taxes levied to pay any judgments that may exist against the county. And if he has difficulty, and thereby delay ensues, in finding a person who will accept the office of collector for *all taxes,*

and give a bond to collect them, it is the *right and duty* of petitioner, as such County Judge, to proceed promptly to appoint a collector for the ordinary county taxes, to pay the current expenses of the county government, so that the laws may be executed, and to proceed further to appoint a collector to collect taxes for the purpose of paying judgments against the county, just as soon as a person can be found who will accept the appointment and execute the proper bond.

But, under the judgment of the United States District Court, affirmed by the Circuit Court of Appeals, petitioner, as County Judge of Taylor County, is forbidden to take the course above stated, and is commanded, in effect, not to appoint any collector to collect any county taxes, for any purpose, until a suitable person can be found who will undertake to collect not only the usual taxes levied by the county for current expenses, but also those necessary to pay the judgments against the county entered in the United States District Court, and who can, and will, give a proper bond for the collection of all such taxes.

And petitioner has in fact experienced great difficulty in finding, and in fact thus far has not been able to find, any one who will accept the office of county tax collector, and give the bond required by the judgments of the said court; though he has diligently and in good faith tried to find one. And the result of this is that, pending this delay, no taxes of any kind can be collected for the administration of the affairs of the county; although, under the law as construed by the Court of Appeals of Ken-

tucky, petitioner, as County Judge, has the right, and it is his duty, to proceed promptly to cause the taxes necessary for the current administration of the county government to be collected, without waiting until some one can be found who will undertake to collect the taxes and execute the bonds required by said judgments of the District Court.

Petitioner submits, therefore, that a writ of certiorari should be granted by this, the Supreme Court of the United States, to said United States Circuit Court of Appeals for the Sixth Circuit, so as to bring before the Supreme Court the said cause, and the said controversy, and thus enable it to settle the law upon a matter which is absolutely vital to the administration of the law, and the exercise of the functions of government, in Taylor County, Kentucky, and as to which there is a conflict between the decisions of the Court of Appeals of Kentucky and the United States Circuit Court of Appeals, both of which are the law to this petitioner, as an official of the State of Kentucky, and of the County of Taylor.

WHEREFORE, W. T. Hendrickson, Judge of the County Court of Taylor County, prays that a writ of certiorari may be issued to the United States Circuit Court of Appeals for the Sixth Circuit, commanding it to transmit to this court the record in the cause aforesaid, that it may be reviewed as provided by law.

HELM BRUCE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

The legislative and judicial history of the subject of this controversy, stated as briefly as we can present it, is as follows:

The present statute governing the appointment of tax collectors, being Kentucky Statutes, §4131, which is quoted in full in the petition for certiorari, is the result of an amendment made in 1906 to a pre-existing statute. The amendment consisted simply of the addition of the last three lines as they are now found in the statute as quoted in the petition, to-wit:

> "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him."

In a case, the facts of which arose prior to the amendment of 1906, though it was decided by the Court of Appeals of Kentucky subsequent to that date, to-wit, in the case of Commonwealth v. Wade, 126 Ky. 791, the Court of Appeals of Kentucky held that while a County Court had the power to appoint one collector for State taxes, and a separate collector for county taxes, it had no power to divide the county taxes and to appoint one collector to collect the regular revenue of the county and another collector to collect special assessments necessary to pay debts of the county (126 Ky. 799). This case was decided by the Court of Appeals of Kentucky in October, 1907, upon a state of facts which arose prior to 1906, and which

were, therefore, controlled by the statute as it existed prior to the amendment of 1906. In this Wade case, the court construed the old statute as we have just stated, and held, further, that the appointment of a special collector for the collection of any particular part of the county taxes less than the whole was *absolutely void,* for want of any authority in the County Court to make such an appointment. In that case, as appears from the opinion, Wade had been made regular collector of taxes for both State and county purposes, and had accepted the appointment and qualified for both positions by executing bonds in *January, 1902* (page 795). Subsequent to his appointment and qualification, the Fiscal Court of the county made a special levy to pay a certain obligation of the county, and at the time of making the special levy, it appointed a special collector, one Trotter, to collect the taxes thus levied; but Trotter did not qualify as special collector, and Wade did not collect the taxes, claiming that it was not his duty to collect them. As to Trotter's appointment, the court held it was absolutely void, saying:

> "The nomination of W. B. Trotter as collector by the Fiscal Court was void for want of authority to make it." (Pages 799, 800.)

And the court also held that it was the duty of Wade, under his appointment made in January, preceding the special levy, to collect the special levy, and that having failed to do so, his bondsmen were liable.

In the meantime, after the controversy had arisen, out of which the Wade case grew, though before it was de-

cided by the Court of Appeals of Kentucky, the statute was amended, as we have heretofore stated.

The next step was the decision of the case of Tucker v. Hubbert, 196 Fed. 849, by the United States Circuit Court of Appeals for the Sixth Circuit, which was decided *June 4, 1912,* which was subsequent to the amendment, and upon facts which arose subsequent to the amendment. And in that case the Circuit Court of Appeals, adopting the construction of the *original statute* which the Court of Appeals of Kentucky had placed upon it in the Wade case, held further that the amendment of 1906 *had not changed the law as to the County Court's power of appointment,* and that it still had the power to appoint *only one collector of county taxes* and must require of him just *one bond to cover all county taxes.* As just stated, this case of Tucker v. Hubbert was decided June 4, 1912.

A few months subsequent to the decision of Tucker v. Hubbert by the United States Circuit Court of Appeals, the Court of Appeals of Kentucky, on November 14, 1912, decided the case of Commonwealth v. Moody, 150 Ky. 571. And in this case the Kentucky Court held that the amendment of 1906 *had changed the law as to the County Court's power of appointment,* and that the very purpose of the amendment was to change the statute, as construed in the Wade case. It is true the Kentucky Court made a mistake in dates, saying, in substance, that the amendment of 1906 was doubtless passed to meet the Wade case, whereas the amendment was really passed before the Wade case was decided; the court failing to

note the fact that, while the Wade case dealt with the law as it existed prior to the amendment, and said nothing about the amendment, it was in fact decided after the amendment was passed. This, however, does not alter the fact, but rather emphasizes the fact, that the Court of Appeals in the Moody case held, that the effect of the amendment of 1906 was to change the law as construed in the Wade case. In the Moody case the court used this language:

> "The case of Commonwealth v. Wade's Administrator, *supra,* construed Section 4131 and other sections of the statutes *as they existed prior to the amendment of Section 4131 in 1906,* as Wade's delinquencies referred to in that opinion, occurred before the amendment, and the statute *was then construed as allowing* BUT ONE COLLECTOR *of county or district revenue.* It was further held in that opinion that it was not necessary to certify the taxes to be collected, to the collector; that the collector took the place of the sheriff and was responsible for the collection of all taxes levied during his term of office. As stated, in view of this construction of the statute, *the Legislature authorized the appointment of special collectors* and provided specifically that such collector should give bond for and collect *only such revenue as the order of appointment directed him to collect.* It is not for this court to pass upon the propriety or impropriety of this legislation. The legislative department of the State had a right to enact it" (page 574).

This language is unmistakable in its meaning. It contrasts the law before the amendment and after the amendment, and the *power of the County Court* before the amendment and after the amendment, saying that be-

fore the amendment the County Court had the power to appoint *but one collector of county taxes,* but that by the amendment the Legislature authorized the appointment "of *special collectors* and provided specifically that such collector should give bond for and collect only such revenue as the order of appointment directed him to collect."

And the court, having construed the statute in this way, then took up the argument, which had been urged upon it, that the statute, as thus construed, is unconstitutional, as being in violation of the contract between the county and its creditors, and held that the statute as thus construed by it is not unconstitutional, but is a valid exercise of power.

Promptly after the delivering of this opinion, the Commonwealth (which was suing for the benefit of a creditor of Taylor County) filed in that case what it called a "Petition for Rehearing and Modification of Opinion," in which it called to the attention of the court the opinion of the United States Circuit Court of Appeals in Tucker v. Hubbert, 196 Fed., *supra,* wherein that court had reached a different conclusion as to the meaning and effect of the amendment of 1906; and the petition urged the Court of Appeals of Kentucky to adopt that construction of the statute as amended, suggesting that the *judgment* of the court exonerating Moody and his sureties might be allowed to stand, on the ground that the particular order appointing him collector for that year excluded the taxes to pay the judgment in question, but urging that the *opinion construing the statute* be changed to conform to that of the Circuit Court of Appeals in

Tucker v. Hubbert, so that *next year,* when it should come time to appoint a collector, a mandamus might be obtained in the State Court, as had been granted in the Federal Court, commanding the County Court to appoint *but one collector for all county taxes* and to require of him *but one bond to cover all.* And the petition concludes with an earnest appeal

> "to give to these many creditors of Taylor County *living in Kentucky* the same opportunity to have their debts collected by a future regular collector of county revenue, *as the Federal courts have given to non-residents of Kentucky.*"

The court, however, overruled the petition and refused to change either its judgment or its opinion, thus leaving them to stand as the law of Kentucky, controlling upon all courts of Kentucky.

Next in point of time came the decision of the United States Circuit Court of Appeals in Graham v. Quinlan, 207 Fed. 268, which went up from *Green County,* Ky., and was decided June 30, 1913, a few months after the Moody case. In Graham v. Quinlan, the Circuit Court of Appeals followed its preceding opinion in Tucker v. Hubbert, *supra,* briefly referring to the Moody case, and saying of it:

> "We are *not convinced* that the case of Commonwealth v. Wade's Adm'r, 126 Ky. 791, which held that only one collector could be appointed, etc., was intended to be modified by the decision in Commonwealth v. Moody, 150 Ky. 571";

and briefly stating again the court's own reason for still thinking that its original construction of the amendment of 1906, as adopted in its former opinion in Tucker v. Hubbert, was correct.

Then came the present case, decided by the Circuit Court of Appeals, in which in a "*per curiam*" opinion it simply followed its two preceding decisions in Tucker v. Hubbert, and in Graham v. Quinlan.

It is difficult to say, with certainty, how the court, in the present case, means to dispose of the Moody case. It is not clear whether the court means to say that the Court of Appeals of Kentucky, in the Moody case, did not construe the statute as we have heretofore said it did, or whether it means to say that it did construe it in that way, but that it was a dictum, and that it declines to follow the same for that reason.

On this subject we may remark that the Court of Appeals itself certainly did not consider that its language in construing the statute was a dictum, because it not only construed it, as shown by the language we have quoted above, but then took up the question of the constitutionality of the statute, as thus construed, and decided that the statute, as thus construed, was constitutional, which surely the court would never have done, if it had not felt called on to do so, as that court has always followed the practice, which every court follows, of not deciding a constitutional question unless required so to do. And furthermore, as we have seen, it refused to modify the opinion, when urged to do so in order that the law and the remedies applicable to residents of Ken-

tucky might be the same in the courts of Kentucky as those applicable to non-residents of Kentucky in the Federal courts.

And we may further remark that in the case at bar, the United States *District* Court followed the *construction* of the statute given by the Court of Appeals of Kentucky in the Moody case, but, feeling itself not bound by the views of the Kentucky Court on the *constitutionality* of the statute, held that the statute, as construed by the court in the Moody case, was unconstitutional, as being an attempt to violate the obligation of a contract (Rec., 13, 15).

And while it may not be necessary at the present time to make any elaborate argument as to the true construction of the statute, to determine whether the Court of Appeals of Kentucky is correct, or the United States Circuit Court of Appeals is correct, yet we can not refrain from calling attention to the fact that, while the amendment may have been awkwardly worded to accomplish the change in the law which the Court of Appeals of Kentucky thought it did accomplish, yet from a reading of the language of the amendment, it is very difficult to escape the conviction that the Legislature of Kentucky did mean by this amendment to do exactly what the Court of Appeals of Kentucky in the Moody case says it did. Under the pre-existing statute, as construed in the Wade case, there was no power at all in the County Court to appoint a collector for *less than the whole* of the county taxes. It was bound to appoint a collector for the whole taxes, or for none at all. And, as ex-

pressly held in the Wade case, an order appointing a collector for less than the whole was absolutely void for want of power in the County Court to make it. But this amendment manifestly means to recognize the power of the County Court to appoint a collector for less than the whole of the county taxes; for it expressly says that "such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him." This plainly implies that such collector *shall be required* to give bond for, and *shall have the power to collect*, and shall collect, *such taxes as the order specifies, whatever they may be.* But, if the County Court still, as theretofore, has no power to make an order appointing him to collect less than the whole, the order would be void, and would vest no right or power in him, and he would be a trespasser if he undertook to collect taxes under such an order. And the fact that the statute does not so treat him, but treats him as authorized to collect, to whatever extent the order specifies taxes to be collected by him, shows that the amendment was intended to *recognize the power of the County Court to make such an order;* for if the order is valid, and the appointee has the right to act under it, the County Court *has the power to make it.* And if the court *has the power* to make it, then, manifestly, no court, Federal, or otherwise, has any right to control the discretion of the County Court as to whether it will make such an order, or not.

Think of the extraordinary situation in which the construction now adopted for this statute places a county.

The regular collector is appointed in January of each year. The order appointing him must specify the particular taxes he is to collect. He is authorized to collect no others, and his bond covers none other. Suppose during the next month, February, the court house burns down, or a great freshet washes away all the bridges in the county, or some other public misfortune comes. A special tax may be *levied* to meet the emergency, but, under the present construction of the statute, there is no power to appoint a *collector* to *collect it*, for this would be less than the whole of the taxes for that year, and there is no power, they say, to make such an appointment. The regular collector, as we have seen, would not be required to collect it, nor would his bond cover it, because not specified in the order appointing him. There would be absolutely no means, therefore, by which the county could collect a dollar to meet such a situation until possibly nearly a year after the emergency had arisen.

The statutes of Kentucky were never intended to have any such effect, and the Court of Appeals of the State has so held.

We suppose it is not necessary, and possibly would not be appropriate, at the present time, to discuss the *constitutionality* of the statute as construed by the Court of Appeals of Kentucky. We feel very confident that we can uphold it. The amendment of 1906 made absolutely no change in any right or remedy theretofore existing, except that instead of all county taxes being collected, as theretofore, by one collector, the amendment allowed the County Court to appoint two, or more, col-

lectors; the duty to appoint, and the duty to collect, and the means afforded for forcing collection, remaining absolutely unchanged. But, without entering into the detail of the argument at present, we simply submit that, as the Court of Appeals of Kentucky has held the statute to be constitutional, the question is surely worthy of argument before the statute is condemned.

We therefore ask that the writ of certiorari be granted, and the cause brought here, that the important question involved may be settled by this the only tribunal that can settle it.

HELM BRUCE,
Counsel for Petitioner.

Supreme Court, U. S.
FILED
JAN 13 1917
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CLERK

No. 428

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, Judge of the County Court of Taylor County, Kentucky, - - Petitioner;

versus

ELIZABETH CREAGER, - - - - - Respondent.

Brief for Respondent on Petition for a Writ of Certiorari.

W. O. Harrod
Of Counsel

L. A. FAUNEST,
Counsel for Respondent.

Commonwealth Co. Printers, Lawrenceburg, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY, - *Petitioner,*

versus

ELIZABETH CREAGER, - - - - - - - *Respondent.*

BRIEF FOR RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI.

The only question decided by the Circuit Court of Appeals, and sought to be brought before this court by certiorari, is whether or not the statutes of Kentucky authorize the appointment of more than one collector of the county levies. No constitutional or Federal question is involved. The Circuit Court of Appeals had twice construed this same statute in the same way in former opinions. The effect of the decision is to give the creditors of Taylor County, Kentucky, some hope that that county may eventually be made to pay its just and unquestioned bonded indebtedness. This does not seem to be a case of such gravity and importance as would require this court to issue a writ of certiorari to the lower court (*Ex parte* Lau O. W. Bew, 141 U. S. 583; *Re* Woods, 143 U. S.

202). If such writ is issued in cases like this the court will be overburdened with similar applications.

The opinion of the Circuit Court of Appeals in this case does not in any way conflict with the decision of the Kentucky Court of Appeals in the case of Commonwealth v. Moody, 150 Ky. 571, but, on the contrary, reviews that case, and is in conformity with it and the earlier case of Commonwealth v. Wade, 126 Ky. 791.

In Commonwealth v. Wade, 126 Ky. 791, the Court of Appeals of Kentucky expressly held that only one collector could be appointed for all the county taxes. The statute, as then construed, is the same in every particular as the present statute, with the exception that there have been added thereto the words "but such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the County Court appointing him." This addition was not made for the purpose of altering, and does not attempt to alter, the number of collectors that may be appointed, but merely requires what might be termed a certification to the collector, in his order of appointment, of the taxes that he is to collect.

In Commonwealth v. Wade, it was contended, among other things, that a collector was not responsible for the collection of any taxes, except those certified to him; but the court there held that the law did not require such certification, and that the collector must collect all taxes levied, whether before or after his appointment. This was a considerable hardship, under some circumstances, and the sole purpose of the amendment to the statute was

to relieve him of this hardship and to allow him and his prospective sureties to look to his order of appointment to learn the measure of the liability they were assuming.

In the Moody case, *supra,* relied upon by petitioner, and which arose after the said amendment, the only question before the court was whether the collector was liable beyond the particular taxes mentioned in his order of appointment. The court stated the question before it as follows:

> "Appellees claim that they are not liable for this tax levy *because Moody had no right to collect it as he had not been ordered to do so,* that he was only appointed as special collector for the county under the following order:" (Setting out the order to collect a specific levy made on a named day and not including the tax sued for.)
>
> "It is further claimed that appellees are not liable for the levy *as Moody only executed a bond to faithfully perform his duties as special collector; that is, his duties as prescribed in the order appointing him.*" (Our italics.)

It will thus be seen that the question presented in that case was whether a collector was liable for a tax not named in the order appointing him, the statute expressly providing that he should not be. The court held that, under the amended statute, he was not responsible for any taxes not set out in the order appointing him. Whether or not more than one collector could be appointed to collect the county taxes was not before the court and was not decided. The language of the court was rather loose and inaccurate in several respects, but must be construed with reference to the matter before the

court. It did not discuss the question as to the duty of the county judge to name all the taxes levied by the county in the order appointing the collector.

The constitutional question discussed in that opinion arose on the matter that was decided as well as it would have arisen upon the question that petitioner claims was decided.

It is said that a petition for a rehearing was filed in that case asking the court to hold that only one collector could be appointed and that this petition was overruled. We are not advised as to this. The official reports do not disclose it. But the court would very properly have overruled such a petition, inasmuch as it would have asked the court to deliver an opinion on a matter not involved on the appeal.

It is also said that in the Wade case the court held that the appointment of a collector for any particular part of the county taxes less than the whole was absolutely void, for want of any authority in the County Court to make such an appointment. We do not so understand the opinion of the court. The reason for holding the appointment of the special collector void in that case was, not because he was appointed to collect only part of the county taxes, but because a collector of county taxes had theretofore been appointed and it was his duty to collect all county taxes. The court said:

> "D. S. Wade having been appointed both as the collector of the State taxes and the county taxes for the year 1902, it was his duty to collect all taxes levied and collectible for that year, whether State

or county, whether regular or special. The nomination of W. B. Trotter as collector by the Fiscal Court was void for want of authority to make it."

The situation is simply this:

Taylor County is seeking to evade the payment of these judgments upon bonds, issued and sold by it to take up an earlier issue of bonds that it bought in at fifty cents or less on the dollar. It makes no defense to the bonds, because it has no defense. But it seeks to defeat the judgments rendered on the bonds by the process of refusing to collect any taxes to pay them. If the County Court is allowed to appoint separate collectors for the taxes to pay these judgments and the taxes for the ordinary expenses of the county, no one will ever be appointed that will qualify to collect the taxes to pay the judgments. To appoint a man who would qualify and collect these taxes would not be a popular move, and it can be depended upon that no county judge will destroy his political aspirations by making such an appointment. The County Court has a discretion in the selection of a collector that can not be controlled. The only effective way to secure the collection of these taxes is to require the collector of the regular county taxes to collect these taxes also. When the courts have thoroughly convinced the people and the officials of Taylor County that they must collect all the taxes or none, there will be no trouble in the collection of all. The sole purpose of the defense is to find a way to defeat these honest debts.

If this were a matter of such importance as to authorize the issual of a writ of certiorari if the judgment

below appeared to be erroneous, it is so manifest that no error was committed by the Circuit Court of Appeals, and that the writ should be denied for that reason.

L. A. FAUREST,
Counsel for Respondent.

Service of a copy of the foregoing brief is acknowledged. March 6, 1917.

HELM BRUCE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

No. ~~975~~. 428

W. T. HENDRICKSON, JUDGE OF THE COUNTY COURT OF TAYLOR COUNTY, KENTUCKY,
Plaintiff in Error,

versus

ELIZABETH CREAGER, - - - - *Defendant in Error.*

MOTION.

Plaintiff in error, W. T. Hendrickson, moves the court to advance this cause for hearing, and as ground of such motion says:

By reason of the judgment of the United States District Court in this cause, and of the inability of plaintiff in error to find any one who will accept the office of tax collector under an order pursuant to that judgment, and to give a bond as required by that judgment, no county taxes have been collected in Taylor County since the entry of that judgment on May 29, 1916, and conditions in the county are becoming worse every day. It is therefore of great importance to the county and its citizens, and can be no disadvantage to the defendant in error herein, that this cause should be speedily decided.

In support of this motion reference is made to an affidavit made by plaintiff in error when the cause was pending in the United States Circuit Court of Appeals, found on page 26 of the record. The conditions described in that affidavit still exist.

HELM BRUCE,
Counsel for Plaintiff in Error.

Notice of the foregoing motion, to be made Monday, April 9, 1917, is accepted:

L. A. FAUREST,
Counsel for Defendant in Error.